Supreme Court, U.S.
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No. 93-1996

In The

Supreme Court of the United States

October Term, 1994

MARY DURHAM,

Petitioner,

v.

XEROX CORPORATION,

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Cortex Corporation
GESCAN International
Image Sciences, Inc.
Intelligent Business Systems
Interfax
Katun Corporation
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Xerox de Panama, S.A.
Xerox del Peru, S.A.
Xerox Trinidad Limited
Xerox Zona Libre, S.A.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Xerox Corporation ("Xerox"), respectfully requests that this Court deny the petition for writ of certiorari of petitioner, Mary Durham ("Durham").

STATEMENT OF THE CASE

Durham's Statement of the Case certainly presents the procedural aspects and summary judgment evidence as she no doubt wishes they appeared in the record below. However, her version is inaccurate and repeatedly misstates even the issues and holdings set out in the opinions and judgments of the courts below. For example,

she mentions only Durham's failure to demonstrate a disparate impact claim as Xerox' ground for its summary judgment. Pet. at 6. She then claims that the trial court "restricted its decision to the disparate impact argument raised by Xerox but granted summary judgment on Durham's entire cause of action." Pet. at 7. These statements are incorrect.

Xerox' motion for summary judgment presented as its first ground that Durham had alleged only a disparate impact claim which is not cognizable under 42 U.S.C. § 1981 ("Section 1981") and, as one of its alternative grounds, that even if she had alleged a disparate treatment claim Xerox was entitled to judgment as a matter of law, because Durham could not prove intentional discrimination. In granting Xerox' motion, the trial court properly framed the issue as follows: "Defendant contends that it is entitled to judgment in its favor because plaintiff cannot prove an essential element of her claim: that the failure to promote her was due to purposeful race discrimination." Pet. App. B at 3. The trial court's opinion discusses disparate impact only in the context of reviewing Durham's argument that the failure to post vacancies for the controller position is evidence of discriminatory intent. Pet. App. B at 5. The trial court rejected her argument and held that Durham "failed to make any showing on [intentional discrimination]" and that Xerox was entitled to summary judgment. Thus, the trial court did not restrict its decision to the disparate impact argument.

This example of Durham's consistent mischaracterization of the record in the courts below epitomizes the misstatements which appear throughout her petition. Xerox will address other major misstatements where

appropriate in the remaining portions of this brief but will not belabor this opposition with undue recitation of gratuitous inaccuracies which are not pertinent to the key questions presented in Durham's petition for consideration by this Court.

REASONS FOR DENYING THE PETITION

I. SUMMARY OF REASONS FOR DENYING THE PETITION

This case is not worthy of review by this Court. What Durham really seeks is a review of the sufficiency of the evidence which was presented as part of two proceedings: (1) Xerox' motion for summary judgment and (2) Xerox' motion to strike Durham's amended complaint. Two lower courts have already thoroughly performed that task and reached identical decisions – namely, Durham failed to raise a fact issue on the essential element of discriminatory intent in her response to Xerox' motion for summary judgment, and the trial court did not abuse its discretion in striking Durham's amended complaint in light of the record before the trial court.

Contrary to Durham's contention, neither the pleadings nor the summary judgment record reflects a distinction between the 1990 and 1991 vacancies for the controller position. Both vacancies were covered in the summary judgment evidence. Furthermore, Durham is incorrect when she argues that Xerox did not provide a nondiscriminatory business reason for its decisions as to both vacancies. Indeed, the court of appeals notes this contention (which was raised for the first time during

oral argument), briefly recounts the evidence of Xerox' business reason in the Opinion and holds that Xerox met its burden of producing evidence of its reason. In her petition, Durham complains only that summary judgment should not have been granted on the 1990 vacancy, and her only basis for this complaint is that Xerox allegedly failed to articulate a business reason for the decision. Not once, with regard to either the 1990 or 1991 vacancy, does she contend that the trial court or the court of appeals erred in finding that she failed to raise a fact issue as to whether Xerox intentionally discriminated against her or whether the reason Xerox gave was a pretext for discrimination.

In her argument that her amended complaint should not have been stricken, Durham has failed to provide this Court a complete statement of the evidence which the trial court had before it. Particularly, she has not informed this Court that she had represented to the trial court at the scheduling conference that the deadline for amending pleadings was sufficient to allow her to add a claim under 42 U.S.C. § 2000e ("Title VII"), that she delayed three months beyond that deadline even though she had received the right-to-sue letter within two days of the deadline, that she did not apprise the trial court that the motion for leave was late, that she did not explain the reason for the delay in violation of Local Court Rule 14(A) for the Western District of Oklahoma, that Xerox was not originally afforded an opportunity to respond to the motion for leave, and that the trial court expressly found that under the circumstances Xerox would be prejudiced if the amended complaint were not stricken. There is no conflict among the circuits on the

facts of this case, because the trial court found actual prejudice under exactly the same standard which Durham argues that the Eighth Circuit required in *Mercantile Trust Co. Nat'l Assoc. v. Inland Marine Prods. Corp.*, 542 F.2d 1010, 1012 (8th Cir. 1976). Furthermore, the trial court's action does not conflict with this Court's decision in *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984).

II. XEROX MET ITS BURDEN OF ARTICULATING A NONDISCRIMINATORY BUSINESS REASON AS TO BOTH THE 1990 AND 1991 VACANCIES

Durham would have this Court believe that:

> The Appellate Court seems to have been misled and thereby erroneously assumed that Xerox' evidence in support of its motion for summary judgment applied to both claims, 1990 and 1991, when in fact the record is void of any reference to the 1991 [sic] claim. Allegations of not posting and downgrading of performance evaluation were applicable to the 1991 promotion, as no one told Durham anything as to the 1990 claims.

Pet. at 15. This is a specious argument. The court of appeals expressly rejected Durham's attempt to distinguish between the 1990 and 1991 vacancies, noting that "Durham's original complaint made no such distinction, alleging both promotion decisions as grounds for relief under § 1981." Opinion n.2 (Pet. App. C [pages are unnumbered]). The court further refused to credit

Durham's argument that Xerox had never offered any proof of its employment decision on the 1990 vacancy:

> Xerox's evidence supporting this legitimate explanation applies to both promotion decisions. Durham first complained about not being interviewed for the controller job in 1989, during the time that Xerox was making the first promotion decision, and Xerox officials told her then that she wasn't qualified. Appellant's App. at 64-65. Xerox gave the same reason for the second promotion decision.

Opinion n.3. Albeit untimely and not until oral argument, Durham did pose these issues to the court of appeals. The court of appeals, *with the entire record before it*, was unpersuaded by Durham's attempt to distinguish between the two promotions. Instead, the court of appeals thoroughly reviewed the summary judgment evidence and concluded that the record covered both the 1990 and 1991 promotions and that Durham had failed to raise a fact issue on discriminatory intent or pretext. Opinion.

A brief review of the record will demonstrate the correctness of the court of appeals' analysis. In paragraphs 8 and 9 of her complaint, Durham describes both the 1990 and 1991 promotions and then alleges the absence of a posting procedure, the downgrading of performance evaluations and the existence of a new and distinct relationship which would have been created had she been made controller. Complaint at 3-4. She ends this series of allegations for Count I, her Section 1981 claim, with paragraph 13, which begins as follows:

> 13 Plaintiff further contends Xerox has so acted on the basis of her race, and as a result Plaintiff suffered loss. . . .

Complaint at 4. Xerox drafted its Interrogatory No. 7 with specific reference to these allegations:

> *INTERROGATORY NO. 7*: State all facts concerning your allegation in paragraph 13 of your Complaint that "Xerox has so acted on the basis of [your] race." Include in your answer the identity of each Xerox employee who acted on the basis of your race, the date each act occurred, a description of the act, and the complete substance of all comments by each Xerox employee identified.

Durham's response to this interrogatory, which was included in Xerox' summary judgment proof, admits that "no one specific employee is responsible for discriminating against her, but alleges that the complete management structure of the Xerox company in filling positions is one that discriminates against Blacks for higher management positions." In light of her pleadings and this interrogatory answer, there is no question that Xerox' summary judgment motion addressed both the 1990 and 1991 vacancies.

In addition, Xerox included in its summary judgment proof its legitimate business reasons for its decisions as to both the 1990 and 1991 vacancies. Interrogatory No. 4 inquires into the facts regarding her allegation that she had brought her "concerns of non-promotion" to her supervisors. As part of her answer, Durham was required to identify the person with whom she spoke, to state the date, and to provide the substance of the conversation. By

her own admission, in response to the interrogatory, she talked with Robert Harper *in 1989* "about not being afforded an opportunity to be interviewed for the position of controller. When Paul Mueller was vacating the position, Mr. Harper advised plaintiff that he did not have to consult with her to fill the position *and that she was not qualified for the position.*" (emphasis added). According to her own testimony, she knew that Xerox thought she was not qualified for the controller position for the 1990 vacancy.[1]

Durham states that pretext and the falsity vel non of the employer's explanation are not issues here. Pet. at 12, 15. She instead rests her entire argument on the insupportable assumption that Xerox did not offer evidence of its business reason for the employment decisions and that her prima facie case alone would defeat summary judgment. By so framing her argument, Durham has effectively conceded that she did not raise a fact issue on summary judgment as to pretext or as to whether Xerox was motivated by racial animus in its decision not to give her the controller position. Intentional discrimination, of course, is the ultimate issue, and the courts below held that Xerox was entitled to judgment as a matter of law on this controlling issue.

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[1] She further responded that she "talked with John Joel in 1991. Plaintiff's conversation with Joel was essentially the same as the conversation with Harper and the results were essentially the same – informing her that she was not qualified for the position." Harper and Joel were part of Xerox management.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING THE AMENDED COMPLAINT AND DID NOT DEPART FROM THIS COURT'S DECISION IN *BALDWIN COUNTY WELCOME CTR. V. BROWN*

As in the arguments on Proposition I, Durham has failed to give this Court an accurate statement of the record below. She has wholly omitted the most pertinent facts which led to the trial court's striking her amended complaint on three grounds:

> The Court concludes that no cause is shown for failing to assert the matters included in the amended complaint earlier as directed in the status and scheduling order, and that prejudice in defendant's trial preparation and to the Court's calendar has resulted.

Order entered August 26, 1992.

A scheduling conference was held on March 5, 1992. Sch. Order at 1. Counsel for Durham appeared by telephone, local counsel for Xerox appeared in person, and trial counsel for Xerox appeared by telephone. *Id.* During the conference, the trial court specifically inquired of the parties whether they would be able to file an motions to amend pleadings by April 1, 1992. Br. on Motion to Strike at 1. Durham's counsel informed the court that she had filed a charge of discrimination with the EEOC, that she had requested a right-to-sue letter, and that she could, and would, move to amend her pleadings by April 1. *Id.* However, Durham did not request leave to amend her complaint until June 30 – three full months past the April deadline set by the scheduling order. App. to Amend at 1.

An order granting leave to amend the complaint was entered the next day, on July 1, before Xerox had an opportunity to oppose the application in accordance with Local Court Rule 14(A) for the Western District of Oklahoma. Order Granting Leave. Xerox did not receive a copy of the order granting leave to amend until July 6. Xerox then moved to strike the amended complaint. Br. on Motion to Strike at 2.

Durham admitted in her application for leave to amend that the EEOC had issued a right-to-sue letter on April 1. App. to Amend at 1. In her application, Durham made no effort whatsoever to explain why she waited three months to request leave to amend her pleadings. *Id.* On the other hand, Xerox demonstrated to the trial court the prejudice it would suffer if the amended complaint were not stricken. The scheduling order set August 1, 1992, as the discovery deadline. Sch. Order at 1. After Xerox received a copy of the amended complaint on July 6, insufficient time remained in which to serve written discovery requests under Fed. R. Civ. P. 33 and 34, which allows a party thirty days to respond. In addition, Xerox had already scheduled the completion of Durham's oral deposition for July 7, the day after Xerox finally received a copy of the amended complaint. Br. on Motion to Strike at 3. Because of the late hour when Xerox received the copy, Xerox did not have an adequate opportunity to prepare to depose Durham on her Title VII claims. *Id.* Xerox also did not have an opportunity to prepare and serve upon Durham an amended deposition notice with a document request on the Title VII issues pursuant to Fed. R. Civ. P. 30. *Id.* Xerox thus either had to forego specific discovery on the Title VII claims completely or had to

incur the expense of another oral deposition and costs for counsel to travel to Oklahoma City one more time. *Id.*

Xerox properly informed the trial court of the necessary discovery which was unique to the Title VII claim. Xerox needed information on what documents Durham had submitted to the EEOC and what statements she had made to the EEOC in responding to the various EEOC questionnaires and would have requested additional documents regarding her charge of discrimination. Br. on Motion to Strike at 3; Reply at 2. Although there are some similarities in the two claims, Title VII and Section 1981 are completely different statutes with completely different elements and defenses. For example, the defense of failure to exhaust administrative remedies is available only under Title VII. *See* 42 U.S.C. § 1981; 42 U.S.C. § 2000e. Xerox had every right to discovery from which it could assess whether Durham had, in fact, satisfied the statutory requirements. On this record, as set out in the parties' motion papers, the trial court expressly found that Xerox had in fact been prejudiced by Durham's delay.

Finally, Xerox reasonably believed that Durham had abandoned her Title VII claim, based upon her counsel's representations at the scheduling conference on March 5, 1992, and her subsequent failure to request timely leave to amend or to request a timely extension of the deadline. Xerox also did not begin taking Durham's deposition until June 3, more than two months after the expiration of the April 1 pleading deadline. Reply at 3. No adequate discovery was conducted with the Title VII claim in mind.

It is interesting that Durham has not offered this Court any explanation for the delay in seeking to amend her complaint. She bases her argument for granting a writ of certiorari to review the trial court's decision solely on the court of appeals' rationale that unexplained delay alone is sufficient grounds to refuse leave to amend. Opinion. However, she has completely ignored the trial court's specific finding of prejudice, both to Xerox and to the court's own calendar. Thus, even if prejudice must be shown, the record reveals (i) that Xerox demonstrated prejudice and (ii) that the trial court specifically found that Xerox and the court's calendar would be prejudiced if the amended complaint were not stricken. On the facts of this case, the standards regarding pleading amendments have been uniformly applied, and there is no conflict with *Mercantile Trust Co. Nat'l Assoc. v. Inland Marine Prods. Corp.*, 542 F.2d 1010 (8th Cir. 1976).

Durham also contends that the trial court's order striking the amended complaint contravenes this Court's decision in *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984). Durham's reliance on this case is misplaced. In *Brown*, a pro se plaintiff argued that her sending of the right-to-sue letter to the district court should be deemed the commencement of the action. This Court rejected that argument, in part because to do so would be a complete departure from Fed. R. Civ. P. 3, which defines commencement of an action as the filing of a complaint, and in part because the plaintiff was well aware of the 90-day deadline for filing a complaint.

Here, Durham was likewise well aware of the deadline for amending her complaint to add the Title VII

claim. She voluntarily agreed to a deadline which was less than the 90 days. Contrary to her argument, this is not a case where a party was led by a court to believe that she had done everything required of her. The trial court expressly ordered that amendments to pleadings had to be filed by April 1, but did so only after consulting with Durham as to whether that was an acceptable date.

Durham quotes from the *Brown* case this Court's comment that "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 152. This language does not help Durham. Fed. R. Civ. P. 16(b) mandates that the trial court "shall" enter a scheduling order "that limits the time (1) to join other parties and to amend the pleadings." The schedule "shall not be modified except upon a showing of good cause and by leave of the district court." Durham failed to show good cause for modifying the scheduling order to permit the late filing of her amended complaint. Adherence to the procedural requirements of Rule 16(b) thus properly resulted in the striking of Durham's amended complaint, which is consistent with the language from *Brown* quoted by Durham.

It should also be noted that allowing the amended complaint would avail nothing. First, since for the purposes of Proposition II she admits that the factual bases of her Section 1981 and Title VII claims are the same, the Title VII claim would be defeated by the summary judgment already entered. Second, she could not prevail even

on a disparate impact claim under Title VII, because Xerox also submitted undisputed summary judgment proof which precludes a disparate impact claim as a matter of law.

A prima facie case of disparate impact requires a plaintiff to "show that a specific identifiable employment practice or policy caused a *significant* disparate impact." *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242 (10th Cir. 1991) (emphasis added); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1161 (10th Cir. 1991) (plaintiff must show that practice has a "substantial adverse impact on a group protected by Title VII"). Durham admits that she cannot meet even this burden. She can point to no other Blacks who might be qualified for a controller position and cannot say even how many controller positions there are. Response to Interrogatory No. 3; Durham Deposition III at 421.[2] Durham had no statistical evidence to demonstrate any adverse impact, let alone a significant impact, on Blacks. Durham Deposition I at 145. She identifies only herself as an impacted individual; however, an impact on only one person is insufficient to prove a disparate impact claim. "A sample of one is too small to demonstrate significant impact." *Drake v. City of Fort Collins*, 927 F.2d at 1161. She cannot, therefore, even allege a prima facie case of disparate impact which is supposedly due to Xerox' posting practice.

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[2] All of Durham's interrogatory responses and the referenced deposition excerpts were included in Xerox' summary judgment proof.

Where it would be futile to allow an amended pleading, the trial court does not abuse its discretion by denying leave to amend. *See, e.g. American West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989). This case involved a situation analogous to that presented by Durham. At issue was a challenge to personal jurisdiction, and the plaintiff sought leave to amend to allege additional jurisdictional facts. The trial court denied leave to amend, concluding that "this was merely another effort to establish jurisdiction through allegations that simply *could not be proven*. The allegations contradicted sworn affidavits and the contents of the contract between [the parties]." *Id.* at 801 (emphasis added). The court of appeals affirmed. Similarly, Durham cannot prove the Title VII claim she seeks to bring, because her sworn interrogatory answers and deposition testimony already preclude a claim based on either disparate treatment (on which summary judgment has been granted) or disparate impact. Thus, the trial court did not abuse its discretion.

CONCLUSION AND REQUEST FOR DAMAGES

Durham bases her entire petition on an inaccurate version of the summary judgment record and the opinions of the courts below. The 1990 claim was not uncontested; to the contrary, Xerox' interrogatories covered the 1990 and 1991 claims by referring to the specific paragraphs and precise allegations in Durham's complaint. Durham's interrogatory answers contain both Xerox' articulated reasons for not promoting Durham to controller and Durham's admission that no one discriminated against her. In addition, the complete record regarding

the trial court's decision to strike the amended complaint demonstrates that the court below did not abuse its discretion. For these reasons, Durham's petition for writ of certiorari should be denied. Durham's petition is frivolous, because it is based solely on serious misstatements of the record below. Costs, damages and other appropriate relief should be awarded to Xerox pursuant to S. Ct. R. 42.

Respectfully submitted,

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